Productivity Commission Inquiry into regulation of the Australian agricultural sector

Australian Competition and Consumer Commission's submission in response to the Draft Report

August 2016

1. Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to respond to the Productivity Commission's (PC) Draft Report on the regulation of Australian agriculture (the draft report).

The ACCC is the Commonwealth statutory authority responsible for enforcing laws that promote competition, fair-trading and consumer protection in Australia. The ACCC administers the *Competition and Consumer Act 2010* (CCA), which includes the Australian Consumer Law, and a range of additional legislation.

In late 2015, the ACCC established an Agriculture Unit, which is focused on engagement with the Australian agriculture sector, to promote competition and compliance with the CCA. In early 2016, the Government appointed a Commissioner with special expertise in agriculture matters. The ACCC received funding to implement these initiatives in accordance with certain recommendations of the Government's Agricultural Competitiveness White Paper.

Notwithstanding the ACCC's current focus on the agriculture sector, the ACCC has a long history of engagement with the sector through enforcement of the competition and consumer laws in the CCA, including administering access regulation, industry codes and authorisations of collective bargaining. The ACCC's submission is drawn from this experience.

The draft report indicates that the agriculture sector is subject to many regulations, which involve compliance costs. In many cases, these regulations are necessary to achieve a policy objective. Nevertheless, the ACCC supports the PC's general view that the costs and benefits of regulation should be carefully considered relative to the policy objective they are designed to achieve. This includes laws and regulations that create 'single desk' or mandated marketing arrangements.

More particularly, the ACCC focuses on the issues outlined in the draft report that relate to the ACCC's competition, consumer protection and regulatory functions. Specifically, this submission:

- clarifies some content presented in the draft report, particularly with regard to water regulation and collective bargaining authorisations and notifications
- supports the draft report's findings regarding road reform, port privatisation and the competition impacts of the New South Wales ethanol mandate, and
- acknowledges policy developments in food labelling laws, as these are areas which the ACCC will eventually have an enforcement role.

The ACCC would be happy to provide further information on any of the issues discussed below should it assist the PC.

2. On-farm regulation of water

Under the *Water Act 2007*, the ACCC monitors regulated charges, transformation arrangements and compliance with the water market rules and water charge rules in the rural Murray-Darling Basin. The ACCC is also the enforcement body for the Water Market Rules (2009) and the three sets of water charge rules.[1]

[1] The 'water charge rules' are: the Water Charge (Infrastructure) Rules (2010) (Cth), the Water Charge (Termination Fees) Rules (2009) (Cth) and the Water Charge (Planning and Management Information) Rules (2010) (Cth).

PC Draft recommendation 4.1	*The Australian Government should implement the findings of the Interagency Working Group on Commonwealth Water Information Provision to reduce duplicative and unnecessary water management information requirements imposed on farm businesses.*

The ACCC participated in the Interagency Working Group (IAWG) on Commonwealth Water Information Provision and supports the Recommendations and Actions of the IAWG final report.

ACCC response to discussion of termination / exit fees

The ACCC notes the discussion of termination fees and exit fees in the draft report,[2] and observes that it is important to clearly distinguish between:

- *termination fees*—fees levied on the basis of a person terminating their right of access to an irrigation infrastructure operator's irrigation network, and
- *exit fees*—fees levied on the basis of water being traded 'out' of a particular network, area or state.

Termination fees and exit fees have historically have both been used to protect an operator and its remaining customers from the risk of 'stranded assets' and under-recovery of ongoing fixed costs as a result of declining use of water service infrastructure. However, termination fees and exit fees are levied on different bases and can have different effects on markets for tradeable water rights. Further, the policy rationale for permitting these kinds of fees and therefore the degree to which they are permitted under state and / or Commonwealth laws may differ.

The ACCC considers that, where rights to hold or take water have been 'unbundled' from rights to delivery of water, exit fees are not an appropriate type of fee for recovery of ongoing costs of the delivery infrastructure. The intent of unbundling is to allow water users to deal with their rights relating to use of storage and delivery infrastructure separately to their rights to hold or use water. In this context, a fee with the purpose to recover the ongoing costs of providing water service infrastructure and mitigate risks of 'stranded assets' should be levied on rights of access to infrastructure (i.e. water delivery rights) rather than on water access rights.

Levying such fees when water access rights are traded (i.e. 'exit fees') works against the policy intent of unbundling and the facilitation of efficient and effective water markets. In this context, the inappropriate use of exit fees:

- distorts trade by providing a disincentive to trade water 'out' of an area, and
- fails to recognise that water users who seek to trade 'out' (whether temporarily or permanently) do not pose a risk to the operator's cost recovery while they continue to hold water delivery rights and pay the associated ongoing infrastructure charges.

The draft report states that '[b]oth the independent review of the Water Act and the ACCC (2015f) noted a lack of submissions on exit fees from farm businesses and agricultural industries more generally. Both concluded that this may indicate that the current fee structure is operating efficiently.'[3] To clarify, we note that during our review of the water charge rules, the ACCC received considerable stakeholder feedback relating to termination fees and fees levied when water is traded. The ACCC did not form the view that 'the current fee structure is operating effectively', but rather made several draft rule advices to:

[2] Draft report, pages 154-156

[3] Draft report, page 155

- improve the operation of the rules for calculating and levying termination fees
- prohibit imposition of certain charges levied when water is traded (which would include the imposition of exit fees).

ACCC response to discussion of other water sector issues

The ACCC notes the PC's intention to examine a number of matters relating to the water sector at a future time as part of its ongoing responsibilities in that sector. The ACCC will provide comments on these issues at that time.

3. Transport

Access to efficient and reliable infrastructure, including infrastructure related to transport, is critical to the overall efficiency of many agriculture supply chains. The ACCC regulates some national infrastructure services and monitors other markets where there is limited competition.

Road reform

PC Draft recommendation 8.2	*The Australian, state and territory governments should pursue road reforms to improve the efficiency of road infrastructure investment and use, particularly through the introduction of road-user charging for selected roads, the creation of Road Funds, and the hypothecation of revenues in a way that incentivises the efficient supply of roads.*

The Australian road network represents an immense piece of infrastructure for the nation, and acts as a key determinant of efficiency throughout the economy. Despite their key role, roads have not been subject to the level of microeconomic reform that has occurred in other industries.

Current arrangements are failing to promote the efficient investment in and use of our road network. On the supply side, decisions about funding for investment in roads are often made via political processes rather than an independent assessment of the relative costs and benefits of a proposed investment. On the demand side, the amount that a user pays for the road network typically has only a weak link to the costs associated with that use, leading to inefficient decisions about how and when to use the roads.

The PC's draft recommendation for reform of those functions of government responsible for road provision and charging would lead to more efficient investment in roads, better informed decisions by road users, and consequently, major productivity gains across the economy as a whole.

In particular, hypothecation of revenues is an important step in building support for reforms as it will provide users with confidence that charges will directly flow into an improved road network.

Port privatisation

PC Draft finding 8.3	*Privatisation of major ports has the potential to increase economic efficiency, provided appropriate processes are followed to ensure that the public interest is protected through structural separation, regulation or sale conditions. Increasing the sale price of ports by conferring monopoly rights on buyers is not in the public interest.*

The ACCC supports the draft finding. While the ACCC generally supports privatisation, it is important that the market structure and regulatory arrangements that will apply post-privatisation are conducive to competition and efficiency. The ACCC is of the view that the privatisation of government owned assets, if implemented appropriately, can be an effective way in which to promote efficient use of infrastructure in the interests of users and the wider community.

However, it is important that governments selling public assets ensure that the appropriate market structure and/or access and pricing arrangements have been put in place as part of the privatisation process. Failure to do so will come at the cost of an effective 'tax' on future generations of farmers and the general community. It will negatively impact upon the productivity of the economy, impeding growth, international competitiveness and living standards.

Wheat Port Code of Conduct

The ACCC also notes the views of the PC on the introduction of the Port Terminal Access (Bulk Wheat) Code of Conduct and the PC's broader view that industry should ultimately transition to rely on Part IIIA of the *Competition and Consumer Act 2010*. As highlighted in the draft report, the Code will be the subject of a review in 2017 to be led by the Department of Agriculture and Water Resources. The ACCC will engage with the grains industry to gauge its views on the appropriate future regulatory settings for the industry. Following exemption decisions it has made, the ACCC also continues to monitor exempt ports, including examining market shares and engages with industry stakeholders more generally.

Coastal shipping

PC Draft recommendation 8.5	*The Australian Government should amend coastal shipping laws by 2018 to substantially reduce barriers to entry for foreign vessels, in order to improve competition in coastal shipping services.*

Changes to Australian coastal shipping regulations in recent years have impeded foreign shipping lines from competing with Australian vessels for domestic trade. The higher costs and administrative requirements have deterred the vast majority of international lines from carrying domestic cargo, despite the obvious efficiencies for vessels already calling at a number of Australian ports.

The PC's recommendation to reduce barriers to entry for foreign vessels would improve competition, and help reduce freight costs for Australian businesses and ultimately prices for consumers. It would also help to reduce the number of trucks on increasingly congested roads and at a time when the nation's freight task is expected to double.

Ethanol

PC Draft recommendation 8.6	*Arrangements to support the biofuel industry — including excise arrangements and ethanol mandates — deliver negligible environmental benefits and impose unnecessary costs on farmers and the community. The Australian, New South Wales and Queensland Governments should remove these arrangements by the end of 2018.*

While recognising environmental benefits that may be associated with the use of biofuels, in past petrol monitoring reports the ACCC has commented that the NSW ethanol mandate has had a significant impact on competition and consumers. In particular:

- it has affected the competitive dynamic between retailers by reducing the availability of regular unleaded petrol (RULP) at many retail sites
- it has reduced consumer choice; some motorists who cannot, or choose not to, use E10 in their vehicles have, because of the reduced availability of RULP, had to use premium unleaded petrol (PULP), which has higher margins than RULP
- since PULP retails at a much higher price than RULP, it has meant that these motorists have been paying significantly higher prices than if they had continued to purchase RULP.

4. Food regulation

The CCA prohibits traders from making false or misleading claims about goods or services. This ensures that any food claims, such as country of origin or free range representations, must be accurate. False or misleading claims of this nature not only harm consumers, but are also detrimental to businesses in the supply chain that use the unique characteristics of their product to obtain a competitive advantage.

Country of origin labelling

PC Information request 9.1	*The Commission is seeking information on whether the new country-of-origin labelling system would deliver higher net benefits to the community as a voluntary system rather than as a mandatory system.*

The Country of Origin Food Labelling Information Standard 2016 was made on 13 April 2016. It compels traders to provide a greater degree of information as to the makeup of food products 'so that consumers can make more informed choices about the food they buy, in line with their personal preferences'.[4]

The Information Standard comes into effect on 1 July 2018. The ACCC has published guidance materials to assist businesses and consumers with the transition.

The Department of Industry, Innovation and Science has policy responsibility for country of origin food labelling.

Free range egg labelling

The ACCC notes the draft report's comments in relation to free range egg labelling.[5] The ACL prohibits egg producers from making false, misleading or deceptive claims in egg labelling. This applies whether or not they participate in a voluntary certification scheme. The ACCC has brought proceedings on a number of occasions for making false or misleading free range claims.[6]

The most recent judgment of the Federal Court on this issue, *ACCC v Snowdale Holdings Pty Ltd* [2016] FCA 541, provides clear guidance to producers looking to make a free range claim. Namely:

- a significant number of consumers would reasonably understand a 'free range' hen to be one that regularly spends time roaming outdoors

[4] Explanatory Statement, *Country of Origin Food Labelling Information Standard 2016.*

[5] Draft report, commences page 354

[6] See, for example, *ACCC v Priovic Enterprises Pty Ltd* (No 2) [2014] FCA 1028, ACCC v *RL Adams Pty Ltd* [2015] FCA 1016 and *ACCC v Derodi Pty Ltd* [2016] FCA 365, *ACCC v Snowdale Holdings Pty Ltd* [2016] FCA 541.

- by making a free range claim, Snowdale Holdings represented that eggs in the carton had a particular history; where most hens had roamed freely on an open range on most days
- in circumstances when the representations related to a very low percentage of the flock going outside on most days, the free range representation was misleading.

In 2015 Consumer Affairs Ministers committed to the implementation of a free range egg labelling ACL National Information Standard. The details of a National Information Standard to address consumer information requirements are yet to be announced.

The Treasury has policy responsibility for the National Information Standard.

5. Competition regulation

The ACCC is the national regulator of competition, fair trading and consumer protection laws. Through its engagement with the agriculture sector, it is clear that imbalances in bargaining power are a key concern for many farmers and agriculture businesses. It is therefore critical for the agriculture sector, and the broader economy, that the legal framework for areas of the CCA such as collective bargaining, misuse of market power and industry codes is working effectively.

PC Draft finding 11.2	*Existing competition regulation and oversight is adequate for managing the risk of supermarkets abusing market power in their dealings with farm businesses and wholesale merchants.* *Suggestions to amend exemptions that allow collective bargaining under section 45 of the Competition and Consumer Act 2010 (Cwlth) are unlikely to increase collective bargaining by farm businesses.*

The ACCC notes that both the misuse of market power provisions and the Horticulture Code of Conduct have been the subject of recent extensive review.

The ACCC considers that the amendments of section 46 that have been accepted by the Government should be progressed. The ACCC considers that the Horticulture Code review recommendations should be carefully considered by the Government. These and other competition and fair trading issues are discussed in further detail below.

Section 46

The ACCC considers that section 46 of the CCA does not adequately address unilateral conduct that is anti-competitive and does not adequately protect the competitive process.

The ACCC has made several submissions on this issue, including to the Harper Review of Competition Policy[7] and subsequent misuse of market power review.[8] Our most recent submission was to the New Zealand Government's review of their equivalent misuse of market power provision, section 36 of the *Commerce Act 1986* (NZ).[9] Our submission on section 36 succinctly sets out the ACCC's reasoning in relation to the deficiencies of section 46 in addressing anti-competitive unilateral conduct. The ACCC would be grateful if the PC could review this submission.

[7] http://www.accc.gov.au/about-us/consultations-submissions/accc-submissions#competition-policy-review

[8] http://www.accc.gov.au/about-us/consultations-submissions/accc-submissions#misuse-of-market-power

[9] http://www.accc.gov.au/system/files/Targeted%20review%20of%20the%20Commerce%20Act%201986%20%28NZ%29%20cross%20submission.pdf

Finally, the ACCC also notes that, whereas the draft report is confined to a consideration of section 46 in the context of agricultural supply chains, section 46 is an economy-wide provision and its efficacy should be assessed on the basis of its application to the economy as whole.

Collective bargaining

The ACCC considers that small businesses, including farmer businesses, can sometimes be better off negotiating with larger businesses as a group. Collective bargaining can create efficiencies and result in better contract terms and conditions than could be achieved through a series of individual negotiations with a larger supplier or customer.

However, businesses who act collectively without prior approval from the ACCC risk breaching the CCA. The ACCC can allow collective bargaining arrangements to go ahead where the public benefit will outweigh the public detriment, including from any lessening of competition. Small businesses can seek ACCC approval via the authorisation or notification process. Approval enables the collective bargaining to go ahead without the risk of legal action for breaching the CCA.

Since 2007, the ACCC has considered and approved approximately 27 collective bargaining arrangements from groups in the agriculture sector (18 by way of authorisation and 9 by way of notification).

However, the ACCC is concerned that the collective bargaining notification process, which was introduced specifically for small business, has not been widely used (relative to authorisation). The ACCC notes that it receives very few proposals that involve collective boycotts, even when it could be efficient. As such, the ACCC has recommended amendments to the CCA to simplify the collective bargaining notification process to increase the use of collective bargaining by small business, including for efficiency-enhancing collective boycott activity. The amendments will also increase the flexibility and attractiveness of the notification process for small business applicants relative to the authorisation process.

The ACCC's recommendations were accepted by the Harper Review, which also recommended that the ACCC should enhance the awareness of the collective bargaining notification process and its benefits for small business. The ACCC has subsequently commenced work to highlight the benefits of collective bargaining and the ACCC approval process to farmers and small businesses generally. This work is ongoing.

The Government announced its support for the recommendations of the Harper Review in relation to collective bargaining and has indicated it will develop exposure draft legislation for consultation.

Clarifying content in the draft report

There are a number of issues in the draft report in the discussion on collective bargaining that the ACCC considers require clarification.

- *Pages 427 – 428 of the draft report states 'the ACCC's 'authorisations & notifications' register reveals that exemptions to section 45 have only been approved eight times for five small groups of farmers in the citrus, chicken and dairy industries.'*

  Since 2007 when the collective bargaining notification process was introduced in the CCA, the ACCC has approved notifications from nine collective bargaining groups in the agriculture sector (the citrus, chicken and dairy industries).

Over the same period, the ACCC has approved 18 applications for authorisation (excluding minor variations) of collective bargaining arrangements involving groups in the agriculture sector. The collective bargaining authorisations cover groups of farmers in the chicken, dairy, potato, tomato, vegetable, wine grape and dried vine fruit industries.

- *There are a number of references to section 45 of the CCA as providing for exemptions for collective bargaining and collective boycotts and whether changes to section 45 will result in more farm businesses engaging in collective bargaining.*

  There are no proposals to amend section 45 as a means to increase the use of collective bargaining. The collective bargaining notification and authorisation provisions are in Part VII of the CCA (sections 88 – 93). The proposed amendments are to the collective bargaining notification provisions in section 93 of the CCA.

- *Page 427 of the draft report states 'For most sectors, collective bargaining is allowed if the annual value of transactions affected is less than $3 million.'*

  The transaction threshold is not relevant to the ACCC's decision to allow a collective bargaining arrangement. The transaction threshold only relates to the eligibility to lodge a collective bargaining notification. It is a means to ensure the use of the notification process is limited to small businesses. There is no threshold for lodging an application for authorisation of collective bargaining.

Horticulture Code of Conduct

The Horticulture Code has recently been the subject of an extensive independent review. The review panel considered that there are a number of issues that limit the value of the Horticulture Code, including:

- The Code only applies to transactions between growers and horticulture traders made under Horticulture Produce Agreements made after 15 December 2006. This results in over 80% of transactions not being covered by the Code.
- There are no financial penalties available for a breach of the Horticulture Code. This means that the ACCC is unable to provide a strong deterrent incentive for compliance.
- Grandfathering and lack of penalties result in low compliance with the current Horticulture Code obligation for a trader to disclose whether they are a merchant or an agent. Many traders claim to be 'hybrid' traders. That is, at the expense of the grower, a 'hybrid' trader obtains the advantages of both class of trader: like an agent, they do not pay for produce before delivery is taken; like a merchant, they do not disclose to the grower what the sale price is.

The ACCC looks forward to the Government response to the Horticulture Code review and any subsequent amendments to the Code to improve its efficacy. Further information on the ACCC's views of the Horticulture Code can be found in its submission to the review.[10]

The draft report also states that 'The cost of administering the Code includes the cost of establishing the Agricultural Enforcement and Engagement Unit to conduct investigations (ACCC 2016a).' However, the ACCC's Agriculture Unit is separately funded as an initiative of the Agricultural Competiveness White Paper.

[10] http://accc.gov.au/about-us/consultations-submissions/accc-submissions#industry-codes

Food and Grocery Code

The ACCC agrees with the PC view that it is too early to draw any conclusions about the operation of the Food and Grocery Code, which only commenced on 3 March 2015.

As a voluntary prescribed industry Code, it is legally enforceable against wholesalers and retailers who elect to be bound, currently only Woolworths, Coles, Aldi and About Life. The Food and Grocery Code is scheduled for a detailed review before the end of 2017. The ACCC considers that review is the appropriate vehicle to consider the efficacy or otherwise of the Food and Grocery Code. In the meantime, the ACCC will continue to monitor developments in the sector and will consider appropriate enforcement action as necessary.

International Standards

In relation to its consumer product safety role, the ACCC has consulted stakeholders and published criteria for accepting international standards as part of mandatory safety standards for consumer goods. The ACCC will apply these criteria whenever mandatory safety standards are developed or reviewed under the ACL. This will improve choices for consumers, reduce costs for business and improve competition in consumer goods.